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Nos. 84-801 and 84-805

In the Supreme Court of the United States

OCTOBER TERM, 1984

MIDLANTIC NATIONAL BANK, PETITIONER

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, DEBTOR, PETITIONER

v.

CITY OF NEW YORK, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a bankruptcy trustee's power to abandon property that is a financial burden to the bankruptcy estate is subject to generally applicable law safeguarding public health and safety.

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INTEREST OF THE UNITED STATES

The reach of the Bankruptcy Code is once again tested by the financial distress of a debtor that handled hazardous wastes. Compare *Ohio* v. *Kovacs*, No. 83-1020 (Jan. 9, 1985). The question presented in this case, whether

the trustee of a bankrupt company may abandon financially burdensome hazardous wastes and related property free from state law constraints, implicates multi-faceted federal concerns. As an initial matter, the United States administers the Bankruptcy Code's pilot program for United States Trustees. See 11 U.S.C. 1501 *et seq.* The United States thus recognizes the trustee's central and, indeed, essential role under the Code and has a fundamental interest in this Court's interpretation of the trustee's abandonment power. But the United States also enforces a broad range of public health and welfare statutes [1] and is therefore attentive to the states' legitimate rights to protect the health and safety of their citizenry. Federal environmental statutes, although not at issue in this case, typically complement state laws and frequently are implemented through a federal-state partnership,[2] embrace basic principles of federalism and rely heavily on the states' exercise of traditional police powers.

The United States has a particularly acute interest in this case on account of its activities at the debtor's waste site in Edgewater, New Jersey. The United States Environmental Protection Agency, recognizing that the Edgewater site poses a serious risk to public health and safety, has initiated an emergency removal action under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9604, to alleviate immediate public health risks at

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[1] *E.g.*, Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*; Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*; Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*; and Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*

[2] See, *e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6921, 6926, 6929, 6931; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9604(c) and (d), 9605, 9611(f), 9614.

the site.[3] EPA also is contemplating actions for reimbursement of its cleanup costs from potentially responsible parties.

STATEMENT

Quanta Resources Corporation, a Delaware corporation formed in March 1980, operated three waste oil recovery facilities located, respectively, in Edgewater, New Jersey; Long Island City, New York; and Syracuse, New York. Environmental conditions at the Edgewater and Long Island City facilities are at the center of the present dispute.

Quanta acquired the Edgewater facility in July 1980 through the purchase of the assets of Edgewater Terminals, Inc. By that purchase, Quanta received a lease of the underlying real property, outright ownership of the facility and its inventory, and an assignment of the temporary permit issued by the New Jersey Department of Environmental Protection (NJDEP). On June 3, 1981, petitioner Midlantic National Bank (Midlantic) provided Quanta with a $600,000 working capital loan secured by Quanta's inventory, accounts receivable, and certain equipment.

Quanta acquired the Long Island City facility through the purchase of the assets of Hudson Oil Refining Corporation. By that purchase, Quanta acquired an owner-

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[3] EPA became involved at the site following an April 18, 1984, request from the New Jersey Department of Environmental Protection for application of "Superfund" monies, see 42 U.S.C. 9631, available under CERCLA, see 42 U.S.C. 9604, 9611, to institute an immediate removal of hazardous materials from the site. EPA, acting on an investigation by its Regional Office and a review by the Centers for Disease Control, concluded that the site posed an immediate risk of harm to public health and welfare and authorized the expenditure of $4,460,000 to commence removal actions. See 42 U.S.C. 9601(23). Copies of New Jersey's April 18, 1984, funding request, the EPA Regional Office's January 25, 1985, action memorandum, the Centers for Disease Control's March 28, 1985, hazard determination, and EPA's approval memorandum have been lodged with the Court.

ship interest in the real property (subject to two mortgages totalling $454,464), the facility, and its inventory. Quanta also became subject to a consent order with the New York Department of Environmental Conservation requiring Quanta to bring the facility into compliance with state environmental law.

In June 1981, some time after Quanta received the Midlantic loan, an NJDEP inspection at the Edgewater facility uncovered unlawful concentrations of polychlorinated biphenyls (PCBs), which are extremely toxic carcinogens, in Quanta's waste oil inventory. The presence of PCBs violated Quanta's operating permit; accordingly, in July 1981, Quanta ceased its Edgewater operations at NJDEP's request. Quanta and NJDEP engaged in negotiations concerning cleanup of the property. However, on October 6, 1981, Quanta filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. On October 7, 1981, NJDEP ordered Quanta to clean up the hazardous wastes at the Edgewater site. On November 11, 1981, Quanta filed for conversion of the Chapter 11 proceeding to a Chapter 7 liquidation and, on November 18, 1981, petitioner Thomas J. O'Neill was appointed liquidation trustee (the Trustee). PCB contamination at the Long Island site was apparently discovered some time after Quanta filed for bankruptcy.

At the time of the bankruptcy filing, the Edgewater facility's inventory included approximately 3.5 to 5.0 million gallons of waste oil, of which approximately 400,000 gallons were contaminated with PCBs. The Long Island City facility's inventory included approximately 500,000 gallons of waste oil, of which approximately 70,000 gallons were contaminated with PCBs. It appears that the PCB contamination extended to the soil and subsoil portions of both sites.

The Trustee attempted without success to sell the Long Island City site for the benefit of Quanta's creditors. On May 25, 1982, the Trustee notified the creditors that he intended to abandon the site pursuant to Section 554 of

the Bankruptcy Code.[4] The City and State of New York (New York) objected, contending that abandonment would threaten public health and safety. The bankruptcy court nonetheless approved the abandonment (Pet. App. 73a-74a).

New York appealed the bankruptcy court's order to the district court and, meanwhile, in response to the public health threat, initiated cleanup of the site. The district court, although noting that "the question is a close one," later affirmed the bankruptcy court's abandonment order (Pet. App. 56a). Shortly thereafter, on May 20, 1983, the bankruptcy court authorized the Trustee to abandon the PCB-contaminated waste contained in storage tanks at the Edgewater facility, despite NJDEP's objections (*id.* at 64a-65a).

New York and NJDEP petitioned the court of appeals for review, respectively, of the district court's judgment and the bankruptcy court's May 20, 1983, abandonment order. On July 20, 1984, a divided panel of the court of appeals reversed both decisions (Pet. App. 1a-35a). The court concluded that the Trustee's abandonment powers under Section 554 of the Bankruptcy Code are subject to state health and safety laws and remanded the case for further proceedings. The dissent agreed with the lower courts that Section 554 gives the Trustee absolute power to abandon property that, from the creditors' perspective, is financially burdensome.

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[4] Section 554(a), 11 U.S.C. 554(a), as then in force, provided in part:

> After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

This language was changed slightly by the 1984 Bankruptcy Amendments, but the amendments did not affect the substance of the provision. See Pub. L. No. 98-353, 98 Stat. 333 *et seq.* Abandonment under Section 554 transfers title to the property from the bankruptcy estate to any party with a possessory interest (typically, the debtor). See 11 U.S.C. 554 note. See also 11 U.S.C. 722.

SUMMARY OF ARGUMENT

The present conflict has been presented largely as a choice between extremes: the Trustee has demanded unfettered discretion to abandon hazardous wastes and related property, while respondents, at least in the initial proceedings, have demanded that the Trustee assume total responsibility for the dangerous conditions. Such absolutism is neither necessary nor desirable. The court of appeals' judgments, holding that the Trustee's abandonment power is limited by state police powers, reasonably accommodates both the Bankruptcy Code and public health interests and finds full support in the principles of equity and fairness that underlie the federal bankruptcy laws.

It has been long established, in a variety of contexts, that a bankruptcy trustee must administer a bankruptcy estate in compliance with federal and state law unless the Bankruptcy Code, by its express terms or necessary implication, displaces or overrides the otherwise applicable law. Indeed, the reach of the Bankruptcy Code is governed by traditional principles of preemption, which require that federal law accommodate state law to the extent that it is possible and consistent with the full purposes of Congress. Moreover, 28 U.S.C. 959(b) specifically requires the trustee to "manage and operate" property within his possession in accordance with state law. The requirement applies not only to actions taken by the trustee in the course of reorganizing an ongoing business, but also to his actions taken in the course of liquidation.

Thus, the issue before this Court is whether Section 554 of the Bankruptcy Code, 11 U.S.C. 554, which authorizes a trustee to abandon financially burdensome property, creates an exception to established law by preempting generally applicable state law safeguarding the public's health and safety. The answer lies in the history and purpose of the abandonment provision. Congress enacted Section 554 as a codification of a judge-made rule

recognizing a trustee's power to abandon burdensome property. It thereby incorporated within Section 554 the judicially-recognized limitations on that power. The courts, prior to enactment of Section 554, had unequivocally recognized that the trustee's abandonment authority was subject to general police powers. Accordingly, a trustee acting pursuant to Section 554 is subject to the same limitation. This result is completely consistent with the purposes underlying the abandonment power. It preserves the trustee's ability to avoid wasteful and unnecessary transaction costs, while recognizing that his administration of the estate must be conducted in accordance with generally applicable law.

Petitioners' contention that a trustee's abandonment authority is absolute must therefore fail. The court of appeals correctly concluded that a trustee's abandonment authority is subject to traditional state police power limitations. Although specific state environmental statutes such as those suggested by the court of appeals may impose relevant limitations in certain cases, we believe that state public nuisance law provides the clearest and most flexible limitation on a trustee's abandonment authority in a case such as this one. The relevant nuisance principles do not absolutely proscribe abandonment. Instead, they require that the trustee, prior to abandonment, take steps that are reasonable, in light of conditions at the hazardous waste site and the resources of the bankruptcy estate, to ensure that discharge of the property from his custodial care will not create or aggravate a threat to public health and safety. The application of traditional nuisance principles to the facts at hand finds solid support in state law. Additionally, it is consistent with the bankruptcy courts' traditional practice of accommodating competing interests. In all events, petitioners' claim that the application of state law threatens an unconstitutional taking of creditors' property rights is meritless. Thus, the United States urges affirmance of the court of appeals' judgments but suggests a somewhat different interpretation of the applicable state law.

ARGUMENT

A BANKRUPTCY TRUSTEE'S ABANDONMENT OF HAZARDOUS WASTES AND RELATED PROPERTY IS SUBJECT TO GENERALLY APPLICABLE STATE LAW SAFEGUARDING PUBLIC HEALTH AND SAFETY

The Bankruptcy Code charges the bankruptcy trustee with specific enumerated duties and concomitant powers in liquidation proceedings, giving him extensive control over the management of the estate. See *CFTC* v. *Weintraub*, No. 84-261 (Apr. 29, 1985), slip op. 8. The states, meanwhile, have extensive and long-recognized powers to protect the public health and welfare.[5] The trustee and the states thus exercise firmly established authority within their respective spheres and, together, they have enjoyed a relatively peaceful co-existence. However, the special problems presented by the instant dispute—the potentially enormous costs of hazardous waste cleanup and the frightening threats to public health and safety—have brought these powers into ostensibly sharp confrontation. Nonetheless, the clash seems largely the result of the rather extreme positions advanced below: the Trustee has demanded unfettered discretion to abandon the hazardous wastes and related property without regard to resulting public health and safety consequences; meanwhile, respondents, at least in the initial proceedings, demanded that the Trustee assume total responsibility for the hazardous conditions. These polar positions are inconsistent with the general policies of bankruptcy and have created a confrontation where none should exist.[6]

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[5] *E.g.*, *Hawaii Housing Authority* v. *Midkiff*, No. 83-141 (May 30, 1984), slip op. 9-10; *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387-388 (1926); *Lawton* v. *Steele*, 152 U.S. 133, 136 (1894); *Mugler* v. *Kansas*, 123 U.S. 623, 668-669 (1887).

[6] As the House Report on the 1978 Bankruptcy Reform Act noted, "[b]ankruptcy law cuts across many other areas of the law. In the interaction between bankruptcy law and other laws, each bends somewhat to accommodate the policies of the other." H.R. Rep. 95-595, 95th Cong., 1st Sess. 228 (1977). See, *e.g.*, *NLRB* v. *Bildisco & Bildisco*, No. 82-818 (Feb. 22, 1984), slip op. 10-12.

Instead, the present clash can be comfortably resolved through a careful reading of the particular requirements of federal and state law.

A. A Bankruptcy Trustee Must Administer The Bankruptcy Estate In Compliance With Federal And State Non-Bankruptcy Law Unless The Bankruptcy Code, By Its Express Terms Or Necessary Implication, Displaces Or Preempts The Otherwise Applicable Law

The Bankruptcy Code does not grant the trustee any general power to avoid compliance with non-bankruptcy law. Thus, like any other entity, he must generally comply with such law in discharging his duties.[7] Indeed, this Court has long recognized that if Congress wished to grant the trustee any extraordinary exemption from non-bankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Swarts* v. *Hammer*, 194 U.S. 441, 444 (1904).[8]

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[7] See *Ohio* v. *Kovacs*, No. 83-1020 (Jan. 9, 1985), slip op. 10 (trustee "in possession" of a hazardous waste site must comply with state environmental laws); *Otte* v. *United States*, 419 U.S. 43, 52 (1974) (trustee must comply with IRS recordkeeping requirements); *Swarts* v. *Hammer*, 194 U.S. 441, 444 (1904) (trustee must pay state and local property taxes, because "there is nothing in [his trust responsibilities] to withdraw [the property] from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either").

[8] See also *NLRB* v. *Bildisco & Bildisco*, No. 82-818 (Feb. 22, 1984), slip op. 19 ("[T]he debtor-in-possession is not relieved of all obligations under the [National Labor Relations Act] simply by filing a petition for bankruptcy."); *Palmer* v. *Massachusetts*, 308 U.S. 79, 85 (1939) ("If this old and familiar power of the states [over local railroad service] was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change."); *Penn Terra, Ltd.* v.

The Bankruptcy Code does specify principles for estate administration that can override conflicting non-bankruptcy law (see *Perez* v. *Campbell*, 402 U.S. 637 (1971)), and a conflict, if truly present, must be resolved through a traditional preemption analysis (*id.* at 649-652). But not every intersection of federal bankruptcy law and state law creates a conflict. Indeed, Section 959(b) of the Judicial Code has largely eliminated the possibilities for conflict between the bankruptcy trustee's exercise of his statutory authority and otherwise applicable state law. That section expressly subjects the trustee to state police power (28 U.S.C. 959(b)):

> [A] trustee * * * shall manage and operate the property in his possession as such trustee * * * according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

Petitioners contend that Section 959(b) is relevant only when the trustee is actually operating the business of the debtor, and not when he is liquidating it (84-801 Br. 23-24; 84-805 Br. 22-23). But this contention is inconsistent with the language, legislative history, and purposes of Section 959(b).

Section 959(b) addresses both management and operation of property. Courts "are obliged to give effect, if possible, to every word Congress used," *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979), and Section 959(b), on its face, encompasses something more than "operation."[9] As the court of appeals noted (Pet. App. 17a),

Dep't of Environmental Resources, 733 F.2d 267, 273 (3d Cir. 1984).

[9] Indeed, if Congress had wanted to restrict Section 959(b) to the operation of a business, it would have used the phrase "carrying on business," as it did in Section 959(a). It has been held that that phrase is limited to actions taken in the operation of a business. *Austrian* v. *Williams*, 216 F.2d 278, 285 (2d Cir. 1954), cert. denied, 348 U.S. 953 (1955).

there is no reason why the phrase "'manage[ment]' of the 'property,'" could not, in the abstract, describe a trustee's custodial care and disposition of property in a bankruptcy liquidation. Indeed, Congress typically uses the term "manage" in conjunction with the term "trustee" to describe a trustee's general activities in administering the trust corpus.[10] Thus, Section 959(b)'s use of the term "manage," evaluated on its face, includes the bankruptcy trustee's general administration of property in his possession, including actions taken in liquidation of the estate.

The legislative history of Section 959(b) supports this conclusion. Section 959(b) originated in state objections raised in the late 19th century against perceived abuses of federal railroad receiverships.[11] Congress, responding to these concerns, adopted a provision expressly subjecting receivers to state law. Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 554. See 18 Cong. Rec. 2542-2543 (1887). This provision eventually evolved into the present requirements

[10] See, *e.g.*, 2 U.S.C. 702(e)(3)(C)(i) (blind trusts for public officials); 5 U.S.C. App. 202(f)(3)(C)(i) (same); 29 U.S.C. 1103(a), 1105(b)(2)(B) and (c)(3) (employee benefit plan trusts). This Court follows that practice as well. See *CFTC* v. *Weintraub*, slip op. 8 (emphasis added) (stating, after surveying the trustee's various powers, that "the Bankruptcy Code gives the trustee wide-ranging *management authority* over the debtor").

[11] The railroad receivership was an invention of federal equity courts designed initially to prevent piecemeal foreclosure of financially embarrassed interstate railroads. See generally 3 R. Clark, *The Law and Practice of Receivers* §§ 847-884 (3d ed. 1959). Receivers were expected "to operate such roads, until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interests of those concerned." *Davis* v. *Gray*, 83 U.S. (16 Wall.) 203, 220 (1872). However, the states charged that the receivers, operating under the aegis of the federal courts, frequently evaded or ignored legitimate state powers, rights, and interests. See S. Misc. Doc. 44, 50th Cong., 1st Sess. (1888); S. Misc. Doc. 7, 50th Cong., 1st Sess. (1887); S. Misc. Doc. 19, 49th Cong., 2d Sess. (1886); H.R. Misc. Doc. 45, 49th Cong., 1st Sess. (1886).

of Section 959(b).[12] The origins of the section demonstrate that it was enacted to prevent federal receivers, and later trustees, from encroaching on general state prerogatives, not only in the operation of a business, but also in pursuing a liquidation. Notably, the equity receivership was a debt management scheme that frequently contemplated either partial or complete liquidation of assets.[13] Indeed, at the time that the original provision was enacted, federal law did not expressly provide for debtor reorganization, and partial or complete foreclosure was the likely prospect.[14] And in all events, particular conduct

[12] The provision has been reenacted on several occasions, but its basic substance has remained unchanged. For present purposes, we need note only two of the amendments. The provision was first codified at 28 U.S.C. 124 (see Section 65 of the Act of Mar. 3, 1911, ch. 231, 36 Stat. 1104). In 1948, it was amended to apply to trustees and debtors-in-possession and recodified at 28 U.S.C. 959(b). See Judiciary Act of 1948, ch. 646, 62 Stat. 927; H.R. Rep. 308, 80th Cong., 1st Sess. A102 (1947).

[13] See generally G. Glenn, *The Law Governing Liquidation* §§ 149-172 (1935); 7 *Moore's Federal Practice*, Pt. 2, ¶ 66.09[1] (2d ed. 1985).

[14] The Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (repealed by Act of June 7, 1878, ch. 160, 20 Stat. 99 *et seq.*), did not provide viable mechanisms for forcing creditors to accept consolidation or composition of debts, and the United States had no general bankruptcy code from 1878 to 1898. See 1 *Collier on Bankruptcy* § 0.05 (14th ed. 1978). Thus, receiverships were originally instituted with full knowledge that a partial or complete foreclosure was a likely prospect. See 3 R. Clark, *The Law and Practice of Receivers* §§ 855-857 (3d ed. 1959). However, the railroads eventually became skilled at using the equity receivership for reorganization purposes, often to the detriment of creditors and the public. See *Securities and Exchange Commission Report on the Study and Investigation, Personnel and Functions of Protective and Reorganization Committees: Strategy and Techniques of Protective and Reorganization Committees*, Pt. 1 (May 10, 1937) (*reprinted in part in* H.R. Rep. 95-595, 95th Cong., 1st Sess. 242-244 (1977)). The resulting abuses eventually led to the adoption of provisions in the 1930's for reorganization in bankruptcy. See H.R. Rep. 95-595, *supra*, at 242, 244.

that the provision without question was intended to reach, such as the abandonment of state-regulated rail service,[15] was likely to occur in liquidation. Thus, Section 959(b)'s legislative origins fully support its application to actions taken by a trustee in liquidating a bankruptcy estate.

Setting aside lexicon and legislative history, the underlying purposes of Section 959(b) require its application to liquidation as well as to the operation of ongoing businesses. The section is intended to advance federalism interests by limiting the power of federal court appointees to avoid state law. There are no sound reasons for requiring federal trustees to comply with state laws when operating a business, but permitting them to disregard those same laws when liquidating the enterprise. If a trustee seeks, for example, to sell adulterated food, controlled substances, or dangerous products to the general public, pursuant to his powers under 11 U.S.C. 363, it should make little difference whether he is operating the debtor's business or liquidating its assets. The effective result of freeing the trustee from state law is the same in either case—intrusion on state legislative and executive mechanisms by a federal court appointee who is unaccountable to the public and perhaps insensitive to state and local concerns.[16]

[15] See, *e.g.*, *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939); *In re Chicago Rapid Transit Co.*, 129 F.2d 1, 6 (7th Cir.), cert. denied, 317 U.S. 683 (1942); *Crawford* v. *Duluth St. Ry.*, 60 F.2d 212, 215 (7th Cir. 1932).

[16] Petitioner Midlantic suggests (84-801 Br. 24) that the dictum in *Missouri* v. *United States Bankruptcy Court*, 647 F.2d 768, 778 n.18 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982), expressing some "doubt" that a bankruptcy trustee must obtain a state license to sell grain when liquidating the assets of a grain warehouse, demonstrates that Section 959(b) is inapplicable to liquidation proceedings. The court's tentative dictum is hardly persuasive. Even if correct (which *we doubt*), it speaks only to the procedural aspects of sale, which would seem to be more susceptible to federal pre-

Section 959(b) is limited, of course, to "valid" state law. It presumably would not operate where the Bankruptcy Code unequivocally preempts the state law or where the state takes action that specifically discriminates against the trustee.[17] But these are narrow exceptions. As a general matter, Section 959(b) demonstrates that a bankruptcy trustee is subject to state police powers in administering the estate, except where the Bankruptcy Code expressly or by necessary implication provides otherwise.

B. Section 554 Of The Bankruptcy Code, Which Authorizes The Trustee To Abandon Financially Burdensome Property, Does Not Preempt Generally Applicable Laws Safeguarding Public Health And Safety

As the preceding section explains, a bankruptcy trustee must generally exercise his powers in accordance with state law. This proposition holds true when the trustee exercises his specific power of abandonment under Section 554 of the Bankruptcy Code, 11 U.S.C. 554. Section 554 codifies a judge-made rule of abandonment and thereby adopts the longstanding judicial corollary that a trustee's abandonment power is subject to general police power regulations. The legislative history of the 1978 Bankruptcy Reform Act confirms that Section 554, far from preempting state law, actually embraces its application.

The 1978 Bankruptcy Reform Act originated in the recommendations presented to Congress by the Commis-

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emption. Indeed, it appears that the Eighth Circuit would agree that the trustee could not sell the grain if state law absolutely forbade its sale on public health grounds rather than simply regulated who sold it. See 647 F.2d at 776 (noting the Bankruptcy Code's deference to state health and safety laws).

[17] For example, the Bankruptcy Code, rather than state law, governs distribution of the estate. *American Surety Co.* v. *Sampsell*, 327 U.S. 269, 272 (1946). The mere fact that state law requires financial expenditures does not, of course, alter distribution priorities. See *Gillis* v. *California*, 293 U.S. 62, 66 (1934).

sion on the Bankruptcy Laws of the United States. See Pub. L. No. 91-354, 84 Stat. 468-469. The Commission's final report included a proposed bill that served as a blueprint for many portions of the 1978 Act. Section 4-611 of that bill expressly recognized the trustee's power to abandon property of the estate "if it is burdensome or has no net realizable value." *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. 93-137 93d Cong., 1st Sess., Pt. 2, at 181 (1973). Citing 4A *Collier on Bankruptcy* ¶ 70.42[3] (1967), the accompanying Commission Note stated that "[t]he concept of abandonment is well recognized in the case law," H.R. Doc. 93-137, *supra*, Pt. 2, at 181. Although the 1898 Bankruptcy Act contained no abandonment provision, the Commission Note indicated that its proposal was adopted from Bankruptcy Rule 608, promulgated under that Act. H.R. Doc. 93-137, *supra*, Pt. 2, at 181. Rule 608, in turn, contained similar language, and its accompanying Advisory Note expressly stated that the Rule "codifie[d] the preferred practice developed under case law." Bankruptcy Rule 608 advisory committee note, 11 U.S.C. App., at 227.

Congress, apparently relying on the Commission's recommendations, fashioned Section 554 in close conformity to the Commission's proposal. Additionally, Congress provided no further elaboration on the section's scope. Thus, Congress, like the Commission and the Bankruptcy Rules Advisory Committee, must have intended to codify the traditional judge-made abandonment rules. Notably, Congress offered no definition of the term "abandon," a bankruptcy term of art that could only be understood by reference to past bankruptcy practices. It follows that the "plain meaning" of Section 554 is, by necessity, the meaning generated by those practices. Indeed, Congress's failure to elaborate on the reach of Section 554 "is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) (footnote omitted).

Congress is, of course, presumed to have codified the judge-made law existing at the time of its consideration and enactment of Section 554. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379-382 (1982); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). At the time that Congress considered and enacted Section 554, the trustee's responsibility to exercise his abandonment powers consistent with federal and state police powers was well established. As a leading bankruptcy treatise noted (4A *Collier on Bankruptcy* ¶ 70.42[2] (14th ed. 1978) (emphasis added; footnotes omitted)):

> The trustee (and in a proper case, the receiver before him) may abandon any property which is either worthless, or overburdened, or for any other reason certain not to yield any benefit to the general estate. *Recent cases illustrate, however, that the trustee in the exercise of the power to abandon is subject to the application of general regulations of a police nature.*

Accord, 2 H. Remington, *A Treatise on the Bankruptcy Law of the United States* § 1142, at 623 (1956).

The Collier treatise specifically cited two cases, *Ottenheimer* v. *Whitaker*, 198 F.2d 289 (4th Cir.), aff'g *In re Eastern Transp. Co.*, 102 F. Supp. 913 (D. Md. 1952), and *In re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir.), cert. denied, 317 U.S. 683 (1942). In *Ottenheimer*, the court of appeals concluded that a bankruptcy trustee, in liquidating the estate of a barge company, could not abandon several dilapidated barges moored in Baltimore Harbor, because the abandonment would have resulted in a navigational obstruction in violation of federal law. The court stated (198 F.2d at 290):

> The judge-made [abandonment] rule must give way when it comes into conflict with a statute enacted in order to ensure the safety of navigation; for we are not dealing with a burden imposed upon the bankrupt or his property by contract, but a duty and a burden imposed upon an owner of vessels by an Act of Congress in the public interest.

The court in *In re Chicapo Rapid Transit* reached a similar result. In that case, a reorganization trustee sought to abandon the debtor transit company's lease of a branch railway line, notwithstanding local law that required continued operation. The court recognized that a bankruptcy court could "not order the utility to abandon a public service, without consent of the state" (129 F.2d at 5), but that it could "cancel a burdensome lease" (*ibid.*). The court, noting that the lessor and lessee both were obligated under a local ordinance to operate the branch line (129 F.2d at 7-8), reconciled the two competing considerations by permitting the trustee to abandon the unexpired lease, but requiring him to continue operations for the account of the lessor. *Id.* at 5-6. Thus, while the court did not forbid the trustee's abandonment of property (or perhaps, more accurately, his rejection of an unexpired lease), it conditioned the trustee's actions to ensure compliance with state law. Notably, the court relied, in part, on the predecessor of 28 U.S.C. 959(b)—28 U.S.C. 124—in concluding that the trustee was bound by state law. 129 F.2d at 6.

Ottenheimer and *Chicago Rapid Transit* demonstrate that a trustee's abandonment power, prior to the 1978 Bankruptcy Reform Act, was limited by federal and state police powers.[18] These mutually consistent cases were well-established and, indeed, recounted in the leading bank-

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[18] A third case, *In re Lewis Jones, Inc.*, 1 Bankr. Ct. Dec. (CRR) 277 (Bankr. E.D. Pa. 1974), offers still further support for this proposition. *Lewis Jones* involved the bankruptcy liquidation of three public utilities that supplied steam heat to city residents. The trustees sought to abandon underground steam lines; however, several governmental entities objected to the trustees' plan because it did not provide for sealing the abandoned lines. The governmental bodies cited various health and safety hazards that would result. The bankruptcy court noted that *Ottenheimer* required compliance with local laws but found none applicable. It nevertheless required the trustees to seal the steam lines, citing the court's equitable power to "safeguard the public interest." 1 Bankr. Ct. Dec. at 280.

ruptcy treatises when Congress codified the trustee's abandonment power. They therefore reflect congressional understanding of the traditional reach of abandonment in bankruptcy and control the interpretation of Section 554.[19]

Petitioners nonetheless contend (*e.g.*, 84-801 Br. 16-26) that Section 554 creates an absolute right to abandon property, regardless of contrary federal or state law. This contention is fatally undermined by the general rule that the trustee must comply with non-bankruptcy law, by the express limitation contained in 28 U.S.C. 959(b), and by the legislative history of Section 554, which clearly indicates that Congress adopted the recognized judicial limitations on the trustee's abandonment power.[20] Indeed, petitioners actually urge a radical and unwarranted *expansion* of the trustee's traditional abandonment power.

[19] The only authority that is even arguably contrary to *Ottenheimer* and *Chicago Rapid Transit* is *In re Adelphi Hospital Corp.*, 579 F.2d 726 (2d Cir. 1978) (per curiam). *Adelphi Hospital* involved the bankruptcy liquidation of a privately-owned hospital. The trustee sought to abandon patient records. The state objected, interposing state regulations that required the "governing authority" of a discontinued hospital to retain hospital records for six years. The court of appeals concluded that the trustee was not a "governing authority" and therefore was not bound by the regulations. 579 F.2d at 728. The court also suggested that the trustee's abandonment power was relatively broad, citing, ironically, *In re Chicago Rapid Transit Co. Adelphi Hospital*, 579 F.2d at 729. Although this per curiam dicta might be read to depart from *Ottenheimer*, it does not create an irreconcilable conflict that beclouds congressional intent. Compare *NLRB* v. *Bildisco & Bildisco*, No. 82-818 (Feb. 22, 1984), slip op. 10. In all events, the case was decided just a few months before enactment of Section 554 and therefore cannot reasonably be considered within congressional contemplation. See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 327 n.19 (1981).

[20] The Trustee casually dismisses *Ottenheimer* in a footnote (84-805 Br. 24 n.7) and does not even acknowledge *Chicago Rapid Transit*. Petitioner Midlantic, meanwhile, suggests that *Ottenheimer* would have been decided differently if Section 554 had then been in existence (84-801 Br. 20). Thus, petitioners fail to come to grips with the central weakness of their argument: Congress, in enacting Section 554, did not write upon a *tabula rasa*; instead, it codified the judicially-developed rule of abandonment, including the established corollary that the trustee must exercise his abandonment power in conformity with federal and state law.

Historically, the trustee's abandonment power has been directed solely to property suffering from contractual, rather than regulatory, encumbrances.[21] Thus, abandonment principles were originally developed to protect the trustee from personal liability for the contractual commitments of the debtor.[22] Under present bankruptcy law, however, the trustee is merely a representative of the estate (11 U.S.C. 323(a)), and he is not subject to personal liability for the estate's obligations. In the modern context, therefore, abandonment is simply a method for

[21] *E.g.*, *McHenry* v. *La Societe Francaise D'Epargnes*, 95 U.S. 58, 60 (1877). Although the early American cases adopting abandonment principles spoke broadly of a trustee's power to decline "property of an onerous or unprofitable character," *e.g.*, *First National Bank* v. *Lasater*, 196 U.S. 115, 118 (1905), the cases all seemingly contemplated property burdened by liens, mortgages, or contractual commitments. See *Dushane* v. *Beall*, 161 U.S. 513 (1896); *Sparhawk* v. *Yerkes*, 142 U.S. 1 (1891); *American File Co.* v. *Garrett*, 110 U.S. 288 (1884); *Glenny* v. *Langdon*, 98 U.S. 20 (1878); *Smith* v. *Gordon*, 22 Fed. Cas. 554 (D. Me. 1843) (No. 13,052). See also Note, *Abandonment of Assets by a Trustee in Bankruptcy*, 53 Colum. L. Rev. 415, 416-417 (1953).

[22] American courts adopted their judge-made rule of abandonment from early English bankruptcy statutes. See 4A *Collier on Bankruptcy* ¶ 70.42[1], at 501 (14th ed. 1978). Under English law, the trustee needed a means of avoiding any contractual liability that might accompany the vesting of title. As a contemporary commentator explained:

> [I]nasmuch as the leasehold estates of the bankrupt vested in his trustee, the Legislature was obliged to provide a means for the trustee to get rid of his liability in respect to those leasehold estates. Sect. 23 was passed for this purpose * * *.

Ringwood, *The Disclaimer of Onerous Property in Bankruptcy*, 82 The Law Times 142 (London, Dec. 25, 1886). See also *A Bankrupt's Onerous Property*, 53 The Justice of the Peace 339 (London, June 1, 1889).

avoiding transaction costs when administering the estate. It permits the trustee to exclude from the estate "property not expected to sell for a price sufficiently in excess of the mortgage or judgment liens to offset the interest and costs of administration." Note, *Abandonment of Assets by a Trustee in Bankruptcy*, 53 Colum. L. Rev. 415, 416 (1953). But there is no support for the notion that Section 554, enacted simply to permit efficient administration of the bankruptcy estate, was ever intended to override traditional governmental authority to protect public health and safety. Clearly, no such intent should be attributed to Congress absent affirmative evidence that it desired such a radical result. See *Swarts* v. *Hammer*, 194 U.S. 441, 444 (1904); *Palmer* v. *Massachusetts*, 308 U.S. 79, 89 (1939).

This Court's recent decision in *Ohio* v. *Kovacs*, No. 83-1020 (Jan. 9, 1985), does not compel a different conclusion. In dictum, the Court observed that a trustee, as a general matter, can abandon a hazardous waste site just as he might abandon any other property. *Kovacs*, slip op. 10 n.12. We might agree that there is nothing unique about a waste site that, in the abstract, distinguishes it from other types of property and excepts it from the trustee's abandonment power. But the same can be said of dilapidated barges or, for that matter, a case of dynamite. A far different question is implicated when the dilapidated barges are moored at the mouth of Baltimore Harbor or, more hypothetically, the case of dynamite sits on a furnace in the basement of a schoolhouse. The question in this case, which was not addressed in *Kovacs*, is whether the trustee may abandon property within his custodial care when the act of abandonment itself would create or contribute to a public health and safety threat. Nothing in *Kovacs* suggests that the federal and state governments, in the exercise of their respective police powers, are powerless to prevent the trustee from abandoning property when, under the circumstances, abandonment itself significantly increases the risk of public harm.

C. New Jersey And New York Public Nuisance Law Limits The Trustee's Authority To Abandon Hazardous Wastes And Related Property

Given that the Trustee's authority to abandon burdensome property is subject to state police powers, the only remaining question is whether New York or New Jersey law actually limits the Trustee's authority in the circumstances presented by this case. The court of appeals observed that state environmental statutes could impose relevant limitations (Pet. App. 4a, 6a, 38a). However, the application of these laws is far from clear, and we leave it to respondents to clarify the applicability of their own laws. For our part, we believe that state public nuisance law provides the most reasonable and workable restraint on the Trustee's abandonment power in this case (see note 35, *infra*).[23] In either event, the court of appeals' judgments must be affirmed.[24]

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[23] State public nuisance law, developed largely through the common law process, is entitled to no less respect than state statutory law. See, *e.g.*, *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938) ("[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."); cf. *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, No. 84-320 (June 3, 1985), slip op. 4-5. Indeed, the flexibility inherent in nuisance law, reflecting its equitable origins, make its application particularly appropriate in bankruptcy proceedings. See notes 33-35, *infra*. See also *In re Chicago, R.I. & P. R.R.*, 756 F.2d 517 (7th Cir. 1985) (considering nuisance principles in bankruptcy); *In re Lewis Jones, Inc.*, 1 Bankr. Ct. Dec. (CRR) 277, 280 (Bankr. E.D. Pa. 1974) (discussed at note 18, *supra*).

[24] We note that the sole issue decided by the court of appeals and now before this Court is whether Section 554 gives the Trustee an absolute right to abandon the property at issue, regardless of otherwise applicable law (see Pet. App. 3a, 36a-37a). Both the district court and the bankruptcy court concluded that the Trustee's power was absolute (see *id.* at 57a, 72a-73a), and both New York and NJDEP challenged that specific conclusion on appeal. The court of appeals reversed, holding that Congress did not intend "that the trustee's abandonment power be unrestricted by public

Each state, as a core element of its sovereignty, has indisputably broad authority to prohibit and abate, as a public nuisance, conduct and activity inimical to the public at large. *E.g.*, *Lawton* v. *Steele*, 152 U.S. 133, 136 (1894); see generally *Prosser & Keeton on Torts*, 649-652 (W. Keeton 5th ed. 1984); Restatement (Second) of Torts § 821B (1979).[25] The creation and maintenance of hazardous wastes in a manner that threatens public health and safety unquestionably presents a public nuisance that is subject to abatement.[26] The Trustee's abandonment of hazardous wastes and related property, at least when the abandonment itself creates or aggravates a public health and safety threat, is likewise subject to reasonable restraints.

State law recognizes that abandonment of even the most innocuous property, without prudent precautions, can threaten public health or welfare and create an

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health and safety regulations" (*id.* at 9a; see also *id.* at 39a), and remanded for further proceedings. In the course of its decision, the court did need to ascertain that some source of state law would impose potential limitations on the Trustee's powers and that this case therefore presented a justiciable controversy. However, the court of appeals' holding does not depend on its view of the applicable state law; the judgments can be affirmed regardless of the source of state law that limits the Trustee's abandonment powers. See *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").

[25] See also, *e.g.*, *State ex rel. Board of Health* v. *Sommers Rendering Co.*, 66 N.J. Super. 334, 338, 169 A.2d 165, 167 (1961) (rendering plant odors); *New York Trap Rock Corp.* v. *Town of Clarkstown*, 299 N.Y. 77, 80, 85 N.E.2d 873, 875 (1949) (quarry operations). See also N.J. Stat. Ann. §§ 2C:17-2, 2C:33-12 (West 1982); N.Y. Penal Law § 240.45 (McKinney 1982) (criminal provisions for knowingly creating or maintaining a public nuisance). But see *Murphy* v. *United States*, 272 U.S. 630, 632 (1926) (government "may provide for the abatement of a nuisance whether or not the owners of it have been guilty of a crime").

[26] *E.g.*, *State* v. *Ventron Corp.*, 94 N.J. 473, 468 A.2d 150, 160 (1983); *State* v. *Monarch Chemicals, Inc.*, 90 A.D.2d 907, 908, 456 N.Y.S.2d 867, 869 (1982).

enjoinable nuisance.[27] The irresponsible abandonment of inherently hazardous wastes poses particularly alarming health and safety concerns. Hazardous wastes, by their very nature, present risks of explosion, fire, contamination of water supplies, destruction of natural resources, and injury, genetic damage, or death through personal contact. When they are abandoned without basic custodial precautions, such as containment measures and provisions for site security, these risks become imminent and their realization inevitable. A state is entitled to invoke its police powers in response.

Contrary to petitioners' suggestions, a bankruptcy trustee cannot claim a special immunity from state demands for pre-abandonment protective measures. A trustee does have fiduciary obligations to creditors (84-805 Br. 26), but he cannot blindly pursue creditors' interests, oblivious to public health and safety threats left in his wake. See, *e.g.*, Restatement (Second) of Trusts §§ 62, 166 (1959) (a trustee is under no obligation to undertake acts that are against public policy or illegal). Although it is true that abandonment in bankruptcy vests title to the property in the debtor corporation rather than the public at large (84-801 Br. 17; 84-805 Br. 36-

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[27] The issue arises frequently with respect to abandoned buildings. *E.g.*, *Beauchamp* v. *New York City Housing Authority*, 12 N.Y.2d 400, 406-407 (1963); *Ozone Holding Corp.* v. *City of New York*, 79 Misc.2d 744, 748, 361 N.Y.S.2d 558, 563 (1974). However, the abandonment of virtually any property that threatens public harm can result in a nuisance. See, *e.g.*, *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973) (abandoned vehicle) (dicta); *Price* v. *City of Junction*, 711 F.2d 582, 585-587 & n.2 (5th Cir. 1983) (abandoned vehicle); *Skinner* v. *Coy*, 13 Cal.2d 407, 417-418, 90 P.2d 296, 300-301 (1939) (abandoned diseased plants); *Decker* v. *Jones*, 194 Kan. 146, 147, 398 P.2d 325, 326 (1965) (abandoned oil and gas drilling equipment); *Touro Synagogue* v. *Goodwill Industries, Inc.*, 233 La. 26, 30, 34, 96 So.2d 29, 30, 32 (1957) (abandoned cemetery); *Massachusetts Society for the Prevention of Cruelty to Animals* v. *Commissioner of Public Health*, 339 Mass. 216, 225-226, 158 N.E.2d 487, 493-494 (1959) (abandoned animals); *Commonwealth* v. *Barnes & Tucker Co.*, 472 Pa. 115, 126, 371 A.2d 461, 466-467, appeal dismissed, 434 U.S. 807 (1977) (abandoned mine).

37), that consequence does not give rise to a meaningful distinction. The filing of the bankruptcy petition divested the debtor of its assets and placed them within the *trustee's* exclusive control. The debtor is destined to exist indefinitely as an empty husk and eventually dissolve, leaving no one accountable for the property. See *Ohio* v. *Kovacs*, No. 83-1020 (Jan. 9, 1985) (O'Connor, J., concurring), slip op. 2. Thus, abandonment to the assetless and evanescent corporate debtor has the very same effect as abandonment to the public at large.[28] Furthermore, the fact that the trustee does not own the property (84-801 Br. 17) cannot permit him to ignore the dangers created by *his* decision to abandon it. The trustee is the custodian of the property and is charged with its care. 11 U.S.C. 704(2). He is not entitled to endanger the public simply because he acts on behalf of the estate.[29] Likewise, the preexisting dangerous propensities of the property do not give him license to increase or

[28] Petitioner Midlantic's argument (84-801 Br. 17) that *Brown* v. *O'Keefe*, 300 U.S. 598 (1937), absolves the trustee of all responsibility for abandonment is an attempt to elevate the trustee, by his bootstraps, to a position above the law. *Brown's* holding that abandonment under the 1898 Bankruptcy Act relates back to the filing of the bankruptcy petition is simply not relevant to whether abandonment is proper in the first instance.

[29] *Reading Co.* v. *Brown*, 391 U.S. 471 (1968), amply demonstrates this point. The trustee's post-petition negligence in administering an estate led to a fire that damaged adjoining buildings. This Court recognized the trustee's duty to prevent the occurrence (*id.* at 477), and concluded that the resulting tort claim was an administrative expense of the estate (*id.* at 482). Just as a trustee owes a duty, on behalf of the estate, of reasonable care to adjoining landowners, he owes a duty to the general public to avoid creating or aggravating a threat of public harm. See also, *e.g.*, *In re Chicago, R.I. & P. R.R.*, 756 F.2d 517, 521-522 (7th Cir. 1985) (suggesting that a trustee may not abandon railroad crossings if the abandonment would create imminent danger); *In re Vermont Real Estate Investment Trust*, 25 Bankr. 804, 806 (Bankr. D. Vt. 1982) (recognizing that a debtor-in-possession or a trustee owed a duty to the public to raze a dangerous building).

aggravate the public threat through abandonment.[30] He has no right to worsen an already dangerous situation. Accord, Hennigan, *Accommodating Regulatory Enforcement and Bankruptcy Protection*, 59 Am. Bankr. L.J. 1, 54 n. 257 (1985).[31]

In sum, the trustee is not immune from a state's exercise of its traditional powers, under public nuisance law, to protect its citizen's health and safety.[32] Nonetheless,

[30] See, *e.g.*, *State* v. *Schenectady Chemicals, Inc.*, 117 Misc.2d 960, 966, 459 N.Y.S.2d 971, 976-977 (1983), aff'd, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (1984). The Trustee claims that abandonment did not cause any threat to the public (84-805 Br. 33). However, the realities of the Trustee's actions belie that assertion. By abandoning the property, the Trustee severed the hazardous wastes from his custodial care and from what financial resources were available to protect the public from imminent harm. For example, upon abandonment, the Trustee's security measures—which prevented public entry, vandalism, and arson—were terminated and all maintenance and remedial measures, initiated by Quanta, came to a halt. Thus, abandonment seriously aggravated the dangers first created by Quanta.

[31] Likewise, it is no answer to suggest that the public assume all responsibility for the consequences of abandonment (84-801 Br. 25-26; 84-805 Br. 37-38). The principles of public nuisance law are expressly intended to assure, to the extent possible, that responsible parties *prevent* threats to the public. A bankruptcy trustee has no greater right than any other party to foist burdens on the public at large. Compare *In re Vermont Real Estate Trust*, 25 Bankr. 804 (Bankr. D. Vt. 1982), with *Paterson* v. *Fargo Realty Inc.*, 174 N.J. Super. 178, 415 A.2d 1210 (1980).

[32] The application of federal hazardous waste statutes is not at issue in this case. We note, however, that those laws, apart from providing other conceivably relevant restrictions, impose limitations analogous to state nuisance law on activities involving hazardous wastes. The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, in addition to providing a comprehensive regulatory scheme, empowers the United States to seek judicial or administrative restraint of activities involving hazardous wastes that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. 6973. The United States may act against "any person contributing to [the] handling,

nuisance law, which relies on principles of reasonableness,[33] does not absolutely proscribe abandonment. Instead, it requires that the trustee, prior to abandonment, take steps that are reasonable in light of the circumstances to protect the public from harm. In determining what steps are reasonable, the magnitude of the public threat is, of course, highly relevant. But of like relevance are the resources of the estate. A trustee cannot be asked to do more than available funds permit; the pre-conditions for abandonment cannot be so costly that they exceed the value of the estate.[34] A court, in determining whether,

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storage, treatment, transportation or disposal" of hazardous wastes. *Ibid.* See also S. Rep. 98-284, 98th Cong., 1st Sess. 58 (1983) (1984 RCRA Amendments). The United States possesses similar authority under CERCLA to secure such relief as may be necessary to avert an "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance." 42 U.S.C. 9606. These particular provisions of RCRA and CERCLA represent a legislative application of public nuisance concepts to protect the public from the dangers of hazardous wastes. See *United States* v. *Waste Industries, Inc.*, 734 F.2d 159, 167 (4th Cir. 1984). The United States may invoke these provisions in a bankruptcy proceeding to prevent a trustee from abandoning hazardous wastes and related property if abandonment would contribute to an imminent and substantial endangerment to health and the environment.

[33] *E.g.*, *Beauchamp* v. *New York City Housing Authority*, 12 N.Y.2d 400, 407 (1963); *State* v. *Waterloo Stock Car Raceway, Inc.*, 96 Misc.2d 350, 409 N.Y.S.2d 40, 45 (Sup. Ct. 1978). See generally Restatement (Second) of Torts § 821B comment e (1979).

[34] Expenses resulting from the pre-abandonment abatement of imminent dangers must generally be paid from estate funds. See, *e.g.*, *Reading Co.* v. *Brown*, 391 U.S. 471, 477 n.7 (1968). Thus, a court cannot reasonably require a trustee to undertake abatement actions that cost more than the estate can pay. The degree of abatement must therefore depend on both the dangers presented by abandonment *and* the available resources of the estate. We note, in this regard, that there is no merit to petitioners' claims that they will suffer ruinous liability absent an absolute right of abandonment (84-805 Br. 18-19; 84-801 Br. 11-12). Absent highly unusual circumstances, such as a trustee's operation of the hazardous

and under what conditions, abandonment is permissible, must balance competing bankruptcy and nonbankruptcy considerations. There is, of course, nothing novel in this process; bankruptcy law frequently requires the exercise of such essentially equitable judgments. Indeed, this Court, in other contexts, has recognized that "the policies of flexibility and equity" are inherent in the Bankruptcy Code. *E.g.*, *NLRB* v. *Bildisco & Bildisco*, No. 82-818 (Feb. 22, 1984), slip op. 10.[35]

In our submission, the present cases must be remanded for a precise application of state law. What is clear is that the district and bankruptcy courts erred in permitting abandonment of hazardous wastes and related property without considering *any* precautions to protect the public health and safety. On remand, the lower courts can determine what actions the Trustee should have taken and how those who acted in his stead should be recompensed.[36]

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waste site or the intentional misconduct of a trustee, the estate alone is responsible for the abatement costs. Likewise, secured claims will be compromised only to the extent that the abatement costs are administrative expenses necessary to preserve or dispose of the security. See 11 U.S.C. 506; see also pages 28-29, *infra*.

[35] In this respect, we believe that grounding the trustee's responsibilities in the specific and somewhat less flexible requirements of state environmental statutes could conceivably thwart the administration of the bankruptcy estate and therefore raise bona fide, albeit case-specific, preemption concerns. By contrast, the inherent flexibility of nuisance principles, applied in the bankruptcy proceeding to the specific facts at hand, avoids this potential problem. Of course, state statutes may be highly relevant, as an indication of the public's interest, in the nuisance analysis.

[36] The question of appropriate pre-abandonment measures cannot be determined on the present record. However, EPA's "immediate removal" activities at the Edgewater site (see note 3, *supra*) are likely examples of reasonable pre-abandonment requirements. These activities include security fencing, drainage and diking repairs, and removal of explosive agents and hazardous materials from structurally infirm tanks. See EPA Region II Action Memorandum (Jan. 25, 1985) (lodged with the Court).

D. State Law Limitations On The Trustee's Abandonment Power Do Not Threaten A Taking Of Creditors' Property Rights

Citing *United States* v. *Security Industrial Bank*, 459 U.S. 70 (1982), petitioners argue that Section 554 must be read to permit unfettered abandonment so as to avoid any possible Fifth Amendment taking of creditors' interests. This argument is plainly meritless; the present case does not raise any constitutional threats to creditors' property rights.

The court of appeals addressed only one issue—whether the Trustee has an unconditional right to abandon burdensome property. It determined that he did not, and remanded to the lower courts to determine what action he should take and how the associated expenses should be funded. The court of appeals left fully intact the Bankruptcy Code's liquidation distribution provisions. Holders of secured claims, such as petitioner Midlantic, remain entitled to their security, 11 U.S.C. 725, or proceeds from its sale, 11 U.S.C. 363, less applicable administrative expenses, 11 U.S.C. 506(c). Holders of unsecured claims remain subordinated to priority claims, which again include administrative expenses, 11 U.S.C. 726. The court did not alter the status of creditors' claims; thus, it is difficult to discern any constitutional threat to creditors' interests.

As the court of appeals recognized (but did not decide), cleanup expenditures might constitute an administrative expense. Indeed, we believe that lawful pre-abandonment expenditures should be so treated. See, *e.g.*, *In re T. P. Long Chemical, Inc.*, 45 Bankr. 278 (Bankr. N.D. Ohio 1985).[37] But any argument that ad-

[37] Compare *Southern Ry.* v. *Johnson Bronze Co.*, 758 F.2d 137 (3d Cir. 1985). In that case, a debtor, prior to bankruptcy, left hazardous wastes on the property of an adjacent landowner and on property that the debtor leased. The adjacent landowner and the post-petition assignee of the lease claimed that they were entitled to an administrative priority for their cleanup costs arising from the debtor's pre-petition activities. The court concluded that the landowner had an unsecured claim and that the assignee, assuming the lease with notice of the wastes, had no claim at all. These claims are quite different from those that are available in the Quanta bankruptcy. New York and NJDEP, as governmental entities, have legitimate administrative expense claims for post-petition activities that state nuisance law *obligated* the Trustee to undertake prior to abandoning hazardous wastes and related property.

ministrative expense treatment of cleanup claims would work an unconstitutional taking is unpersuasive. The potential administrative expense claims do not threaten secured creditors, save those who hold an interest in the hazardous waste site or the wastes themselves and who, as a result, might be subject to a Section 506(c) assessment for costs incurred in preserving their security. See 11 U.S.C. 506(c). In all events, the Quanta waste site and the wastes, prior to cleanup, had negative value and, hence, there was nothing to be taken. Likewise, a post-cleanup Section 506(c) claim presumably would be limited to the value added to the property by the cleanup—hardly a taking in any sense of the word. If petitioners are suggesting that general unsecured creditors face a taking because the administrative expenses subordinate unsecured claims, a traditional takings analysis, as set forth in the court of appeals' opinion (Pet. App. 23a n.11), provides the appropriate response. Even if an unsecured claim in bankruptcy constituted "property" within the meaning of the Fifth Amendment, it would remain subject to federal and state police power. See cases cited at note 5, *supra*. If the federal and state governments can legitimately impose cleanup costs on the corporation prior to bankruptcy, there is no reason why any unsecured creditor who undertook the risk of non-payment can complain about the resulting diminishment of the debtor's estate.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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